

court for approval. I am not saying that they could not have made an application to the court for approval of the sale without a proper written contract, but what I do say is that their intention to agree upon a formal contract is manifestly clear from the option itself which speaks of "the approval of the sale and of the said contract by the High Court".

The authorities would appear to support the view that even where there is nothing in the agreement to suggest that the parties contemplate that the subsequent contract shall contain any new or different terms, nevertheless if it appears that the parties do not intend to bind themselves contractually by the agreement but only by the subsequent contract if and when they should enter into it, there will be no contract. Moreover, if the reference to the execution of the subsequent contract is in words which according to their natural construction import a condition, this will almost invariably be conclusive that the agreement itself was not intended to be a contract. To my mind this was true of this case. It will bear repetition if I say that when the actual phrase "subject to contract" is used, the courts tend to give effect to those words unless there is strong evidence to the contrary. The result is that the agreement which is made "subject to contract" is of no legal effect. Perhaps I should add that the plaintiffs in this case are asking the court to order the defendants to execute the draft agreement agreed upon, which amounts in effect to asking the court to enforce an agreement to enter into an agreement. That is an order which the court clearly has no power to make in the circumstances of the case.

Mr. Ramani cited the case of *Alexander Brogden and Others v. The Directors &c. of the Metropolitan Railway Company* ⁽¹⁹⁾ as an authority for the proposition that circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either and that in such a case the word "approved" written by one of the parties at the end of the draft agreement must be taken as an approval of the substance of the draft. The short answer to that is that there is no evidence in this case that the defendants wrote the word "approved" at the end of the draft agreement. There is also no evidence that the defendants constituted their solicitors as agents for the purpose of signing the draft agreement finally agreed upon. Moreover, subsequent authorities indicate quite clearly that formal execution by the party to be charged is necessary.

Lord Greene M.R. in the case of *Eccles v. Bryant and Pollock*, *supra*, in the opening passage of his judgment said:

"This case is one of that long series of cases which no doubt will go on as long as contracts take place, in which one party to a transaction, which was intended to produce a contract and was carried on on the usual condition that it was to be subject to contract, is attempting to say that a contract came into existence at a date on which the other party says that negotiations had not yet been completed and that no binding contract had come into existence at all."

Those prophetic words of the learned Lord Master of the Rolls are equally true of this case.

The conclusion to be drawn here, therefore, is the same as in that case, namely, that there is no completed contract on which the plaintiffs can sue for specific performance or damages.

In the result I have reluctantly come to the conclusion that there was no concluded contract between the parties to this action. I say "reluctantly" because of the conduct of the defendants in breaking off the negotiations when the terms of the proposed agreement were agreed upon and in capriciously refusing to sign the agreement. However, in the words of Tomlin J. in *Lockett v. Norman Wright*, *supra*, "it is no part of my duty to pronounce whether or not the conduct of any of the parties concerned in this matter is open to censure. All I have to do is to determine whether there is or is not a concluded contract between the plaintiffs and the defendants which the plaintiffs can enforce". Accordingly, the action is dismissed with costs.

Action dismissed.

Solicitors: *Braddell & Ramani; Chung & Huang.*

DEVRAJ NAHAR & ORS. v. GIAN SINGH & CO.

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.)
February 28, 1963]

[K.L. — F.M. Civil Appeal No. 48 of 1962]

Landlord and Tenant — Sub-tenant entering into partnership with two other persons — Partnership carrying on business in same premises — Provision in partnership agreement allowing partner to retire at end of two years — Whether agreement constitutes an assignment.

Control of Rent Ordinance, 1956 — Permitted increases in rent without determining sub-tenancy — Assent of sub-tenant — Whether valid — Object of s.6(2).

The 1st appellant was the sub-tenant of the respondents of premises at which he was carrying on business in partnership with two other persons. Clause 2 of the partnership agreement provided that any partner might retire at the end of two years from the date of the execution of the agreement. The respondents instituted ejection proceedings on the ground that by virtue of the

partnership agreement, the 1st appellant had assigned his sub-tenancy to the other partners in breach of one of the conditions of the sub-tenancy. The 1st appellant counterclaimed for excess of rent paid on the ground that the respondents had not determined the sub-tenancy.

Held: (1) the agreement was one to carry on the business of the partnership and it did not expressly or impliedly assign the sub-tenancy to the other partners;

(2) where a tenant agrees to pay the permitted increases in rent, no notice to determine the tenancy is necessary under section 6(2) of the Control of Rent Ordinance.

Cases referred to:—

- (1) *The Corporation of Bristol v. Westcott* (1879) 12 Ch. D. 461.
- (2) *Feebles v. Crosthwaite* 13 T.L.R. 97.
- (3) *Chaplin v. Smith* [1926] 1 K.B. 198.

COURT OF APPEAL.

N. A. Marjoribanks for the appellants.

R. Ramani for the respondents.

Cur. Adv. Vult.

Hill J.A. (with whom Thomson C.J. and Barakbah J.A. agreed): This is an appeal against the decision of Hashim J. in Civil Suit No. 69 of 1959 given at Kuala Lumpur on 14th August, 1962 in which the following Order was made:—

(a) The defendants to vacate premises No. 11 Mountbatten Road, Kuala Lumpur, by 12 noon, 31st October, 1962.

(b) The defendants to pay arrears of rent at the rate of \$140 per mensem from 1st February, 1958 to the date of vacation of premises.

(c) Plaintiffs to pay defendants \$875.

(d) Each party to pay their own costs.

The respondents were the chief tenants of premises at No. 11 Mountbatten Road, Kuala Lumpur. The first appellant was their sub-tenant.

The respondents discovered that on 24th March, 1958 the first appellant had entered into a partnership deed with the second and third appellants in respect of a business by the name of Nahar & Co. which was conducted at the above premises. The respondents considered that by this agreement, which was an exhibit and is to be found at page 44 of the record, the first appellant had assigned the sub-tenancy to the other two appellants. They further considered that it was a term of the sub-tenancy that the premises were not to be sub-let or assigned without their written permission.

As a result they sued for possession and for arrears of rent.

The learned trial Judge held that Clause 2 of the agreement of the 24th March, 1958 did result in the first appellant assigning the sub-tenancy to the other two appellants. He reasoned as follows and I quote from his judgment:

"Under clause 2 any partner could retire from the partnership at the end of two years from the date of the execution of the agreement. 1st defendant has admitted in his evidence he has received \$20,000 from the other partners. 1st defendant is a resident of Singapore. Under the agreement 1st defendant can retire from the partnership at the end of 2 years from 24.3.58 and if he does retire the result will in fact be that the premises will be under the new sub-tenants, 2nd and 3rd defendants."

Clause 2 was as follows:—

"Any partner may at the end of two years or any subsequent year of the partnership retire from the partnership on giving not less than four calendar months previous notice in writing to the other partners or partner or leaving the same at the place of business of the partnership and at the expiration of such year the partnership shall determine accordingly as to the partner leaving or giving such notice and thereupon the provisions of clauses 17 and 18 of these presents shall (with the substitution of the continuing partner or partners for the surviving partner or partners and of the retiring partner for the representative of the deceased partner and other consequential modifications) apply as if the retiring partner had died at the expiration of such year."

Was there in fact or in law an assignment? With great respect to the learned trial Judge in my view the agreement does not expressly or impliedly assign the tenancy or any part thereof by the first appellant to either or both of the other appellants. It is an agreement to carry on the business of Nahar & Co. at 11 Mountbatten Road or at such other place or places as the partners may from time to time agree upon. The capital of the partnership was to consist of the net value of the stock-in-trade, book debts and other assets of Nahar & Co. The monthly tenancy of the premises was not an asset of Nahar & Co. The first appellant alone was the sub-tenant and what might happen at the end of two years is mere conjecture.

At page 365 of the 12th Edition of *Lindley on Partnership* under the heading "Property used for partnership purposes not necessarily partnership property" it is stated:—

"Again, it by no means follows that property used by all the partners for partnership purposes is partnership property. For example, the house and land in and upon which the partnership business is carried on often belongs to one of the partners only, either subject to a lease to the firm, or without any lease at all."

The Corporation of Bristol v. Westcott ⁽¹⁾ is a case in point. The headnote is as follows:—

"A lease was granted to two partners, B. and H., as joint tenants. The lessees covenanted that they, their executors, administrators, or assigns, or any or either of them, would not, during the term, assign, underlet, or part with the possession of the demised property to any person or persons without the written consent of the lessor; and there was a proviso for re-entry on the breach of any of the covenants. The partners dissolved partnership, and agreed that the partnership property should be made over to B., and that the leasehold property should be assigned to him with the consent of the lessor, if such consent could be obtained, and recited, as the fact was, that A. had given up sole possession of the leaseholds

to B. Consent was not obtained, and no assignment of the leasehold was executed, but B., from the time of the dissolution, remained in sole possession:—

Held (affirming the decision of Bacon V.C.), that there had been no breach of the covenant, and that the proviso for re-entry had not come into operation."

Somewhat similar situations with regard to partners were considered in *Feebles v. Crosthwaite* ⁽²⁾ and in *Chaplin v. Smith* ⁽³⁾ and these cases decided in clear terms that "a lessee who retains possession does not commit a breach of the covenant against parting with possession by allowing other people to use the premises."

I am therefore of opinion that there was no assignment of the sub-tenancy by the first appellant and that the appellants should not have been ordered to vacate the property. In so far as that part of the judgment appealed against is concerned, I would allow the appeal and set aside the order for possession.

There remains the question of the arrears of rent claimed by the respondent and the counter-claim by the first appellant for \$875 for excess rent paid.

In his counter-claim the first appellant pleaded that "the plaintiffs had not at any time complied with the provisions of section 6(2) of the Control of Rent (*sic*) of 1948 which was then in force and determined the sub-tenancy prior to increasing the rent."

It was admitted that no prior notice to quit was given, but the sub-tenant through his manager or agent paid, apparently without protest, the twice increased rent. Once from \$140 to \$175 a month and secondly, from \$175 to \$200.80. He can therefore only be taken to have agreed to the increases and so relieved his landlord of the necessity of giving him notice to quit.

There appears to be some misconception with regard to section 6(2) of the Control of Rent Ordinance. This sub-section is intended to prevent a landlord from arbitrarily imposing the increased rent permitted by sub-section (1) without first obtaining the tenant's agreement. Where the tenant does not agree notice of termination of the tenancy must be given. The sub-section merely indicates that the normal procedure under the common law with regard to the variation of contracts must prevail in spite of the provisions of sub-section (1).

In my view, therefore, the counter-claim for excess rent should have failed and the respondents should have obtained judgment as prayed for arrears of rent at the rate of \$200.80 *per mensem* from 1st February, 1958, to the date of the judgment and I would vary the judgment of the lower Court accordingly.

A I think the respondents should pay the costs of this appeal.

Appeal allowed and order for possession set aside. Judgment of lower Court as to counter-claim varied.

B Solicitors: *Lovelace & Hastings; Braddell & Ramani.*

HAJI HASNAN v. TAN AH KIAN

[C.A. (Thomson C.J., Hill and Barakbah J.J.A.)
February 28, 1963]

[K.L. — Civil Appeal No. 57 of 1962]

Contract — Completion of road works by specified date — Non-completion — Termination of contract — Whether time of the essence.

Contract — Breach of contract — Damages — Quantum meruit.

The appellant having obtained a contract to construct roads sub-contracted with the respondent for its performance. The respondent agreed to complete the whole work on or before May 30, 1960. On May 6, 1960 the respondent commenced work and on May 27, 1960 the appellant inspected the work and found it had not been properly done. On May 30, 1960 the appellant terminated the contract and entered into a fresh contract with another person for the completion of the work. The respondent, on June 4, 1960 requested an extension of time to complete the work and on it not being granted brought an action for work done and materials supplied. Judgment having been entered for the respondent as claimed, the appellant appealed:

Held: (1) the nature of the contract or of its subject matter was such that no inference could be drawn that time was of the essence;

(2) accordingly, the appellant was in breach of his contract and the respondent was entitled to recover on the basis of *quantum meruit*.

Decision of Gill J. ([1962] M.L.J. 400) affirmed.

Cases referred to:—

- (1) *Stickney v. Keeble* [1915] A.C. 386.
- (2) *Yeow Kim Pong Realty Ltd. v. Ng Kim Pong* [1962] M.L.J. 118.
- (3) *H. Dakin & Co. Ltd. v. Lee* [1916] 1 K.B. 566.
- (4) *Planche v. Colburn* (1831) 8 Bing. 14.
- (5) *Smith Construction Co. Ltd. v. Phit Kirivatna* [1955] M.L.J. 8.
- (6) *Sumpter v. Hedges* [1898] 1 Q.B. 673.

CIVIL APPEAL.

Dato R. P. S. Rajasooria for the appellant.
Robert K. C. Hoh for the respondent.

Cur. Adv. Vult.

I *Barakbah J.A.* (with whom Thomson C.J. and Hill J.A. agreed): The defendant (appellant on this appeal) obtained a contract from the District Officer, Kuala Selangor, to supply, transport, spread and level, etc. good quality laterite from Batang Berjuntai Quarry for the making of certain stretches of roads in the Tanjong Karang